

Govt. Appeal (DB) No.55 of 1988
With
Criminal Revision No.914 of 1988

(Against the judgment and order dated 18.6.1988 passed by 2nd Additional District & Sessions Judge, Begusarai in S.T.No.107 of 1985/ 4 of 1988)

The State of Bihar
(in Govt.Appeal)

... Appellant

Versus

1.Md.Akhtar @ Kari
2.Md.Jamal @ Fakira
3.Md.Sanjat
4.Md.Jan Alam

... Respondents

With

Md.Abu Daud
(in Cr.Revision 914 of 1983)

... Petitioner

Versus

1.Md.Akhtar @ Kari
2.Md.Jamal @ Fakira
3.Md.Sanjat
4.Md.Jan Alam

...Opposite parties

For the Appellant
(in Govt.Appeal)

: Mr.Lala Kailash Bihari Prasad,Sr.Advocate

For the Respondents
(in Govt.Appeal &
for O.Ps in Cr.Revision)

: Mr.Shakeel Ahmad Khan,Sr.Advocate
Mr.Abul Kalam,Advocate

Present

THE HON'BLE MR.JUSTICE SUDHIR KUMAR KATRIAR
THE HON'BLE MR. JUSTICE SAMARENDRA PRATAP SINGH

**SK Katriar &
SP Singh,JJ.**

The instant Government appeal is directed against the judgment dated 18.6.1988, passed by the learned 2nd Additional District & Sessions Judge, Begusarai, in S.T.No.107 of 1985/4 of 1988, whereby and where under he has acquitted Opposite Parties 1, 2 and 3, namely, Md.Akhtar @ Md. Kari, Md.Jamal @ Fakira and Md.Sanjat, charged under sections 148 and 302 read with section 149 of the Penal Code.

A criminal revision was also filed at the instance of the informant to the same effect which has been tagged with the instant Government Appeal.

2. The prosecution case, as made out in the Fardbeyan of Md.Abu Daud (P.W.6) of village Saidpur, P.S. Matihani, District Begusarai, recorded on 5.1.1984, at 9 P.M., by Shri B. Das, Officer Incharge Matihani P.S., Village Saidpur, in short is as follows:

i) The informant stated that he along with his younger brother Md.Nadir Sah @ Jumma went to the place of co-villager Md.Mobin (P.W.4) to collect his dues of boring which was used by him for irrigating his field. As the informant and his brother were basking by the Ghura at Mobin's Darwaza, 10-11 persons forming an unlawful assembly came near them. The informant stated that, in the light of the Ghura, the lantern which was hanging in the Oriyani, and in light of the torch which he was carrying, he identified 7 out of 11 persons, namely, Md.Chamru @ Sahadat armed with gun, Noor Alam armed with rifle, Md.Jan Alam (O.P.No.4) armed with gun, Md.Kari @ Akhtar (O.P.1), Md.Samad, Md.Sanjat (O.P.No.3) and Md.Fakira @ Jamal (O.P.No.2), all residents of Village Saidpur, P.S. Matihani. It is further alleged that Md.Kari, Md.Samad and Md.Fakira were also armed with fire arms. It is alleged that Md.Chamru @ Sahadat while warning the informant and others not to flee away, exhorted his associates to open fire whereupon Md.Sanjat fired from his pistol which did not hit any one.

ii) The informant, his brother (deceased), and Mobin fled for their lives and the accused persons chased them. The informant after fleeing some distance hid himself by the side of Simal tree from where he saw his brother Md.Nadir Sah @ Jumma, being surrounded by the accused persons near the southern wall of one Samshul's house. The informant's brother Jumma shouted for help. In the meantime, Chamru, Noor Alam (both not before us) and Md. Jan Alam, fired instantly from their respective guns and rifles at his brother. There was a loud hulla at that time.

iii) The accused persons fled towards the village where after the informant (P.W.6) and Mobin (P.W.4) came near his brother who was lying dead. He found lot of blood

near the dead body having sustained three fire-arm injuries on his cheek, right chin, and chest. On hulla, Md.Adil (P.W.2), Ataur Rahman (P.W.3) and others came running to whom the informant narrated the entire facts. Md.Adil and Ataur Rahman informed that they had seen and recognized the accused persons fleeing with rifle and pistol. The informant alleged that the accused committed the occurrence because of old enmity persisting between the parties.

3. On the basis of aforesaid fardbeyan (Ext.1/3) of P.W.6, a formal F.I.R.(Ext.11) was drawn at 11.45 P.M. in the same night (5.1.1984) and was registered as Matihani P.S.Case No.1 of 1984. After investigation, the Police submitted charge sheet against the accused persons. Thereafter cognizance was taken and the case was committed to the court of sessions. Some of the accused persons absconded in the trial and the case of the Opposite parties were separated and their trial ensued. As stated earlier, charge under sections 148 and 302 read with section 149 of the Penal Code was framed against Opposite Parties 1, 2 and 3, and charge under section 148/302 of the Penal Code was framed against Opposite party no.4. All the accused pleaded not guilty of not committing any such offence and claimed to be tried.

4. The prosecution examined altogether 11 witnesses in support of its case whereas the defence also examined four witnesses. Md. Soyeb (P.W.1) is a hearsay witness, and his evidence is to the effect that he learnt the name of the accused persons from the informant (P.W.6). This witness is brother-in-law (SALA) of the deceased Nadir Sah @ Jumma. He stated that at the time of occurrence he was at the residence of his brother-in-law Jumma where he heard the sound of firing at about 6.30 P.M. On hearing the sound of firing, he ran in the direction of firing and reached near the house of Samshul where informant narrated the occurrence and spelt the name of the accused persons.

5. Md.Adil (P.W. 2) is a F.I.R. witness and is a co-villager of the informant. He stated that around 6.30 P.M., he had gone to bring milk from the residence of one Azim which is only 20 to 25 hands away from the place of occurrence. While he was at the residence of Azim, he heard hulla of a person desperately crying for help soon

followed by firing sound. In the flash of torch light he saw the accused persons who were variously armed fleeing away with weapons in which he recognized the seven accused persons whose names have already been spelt by the informant in his fardbeyan, as noted earlier.

6. Md.Ataur Rahman @ Saheb (P.W.3) has stated that he had gone to Ghasatpur Tola for arranging some labourers and as soon as he reached the house of Samshul, he heard the sound of firing. He turned his torch and in its light he saw Abu Daud, Mobin, and Nadir Sah @ Jumma, being chased by 10-11 accused persons. He recognized all the seven accused persons in his torchlight. He stated that Nadir Sah @ Jumma on being surrounded shouted for help "JAAN MARISH HO", soon thereafter the accused Jan Alam(O.P.4), Md.Chamru @ Sahadat, and Noor Alam repeatedly fired at him with their respective gun and rifle killing him instantaneously. He found the deceased clad in blood, particularly at cheek, right chin and chest. This witness as such claimed to have seen the major portion of occurrence, right from chasing P.W.4, P.W.6 and the deceased to the killing of the latter (Jumma) at Shamshul's southern wall. He had signed the fardbeyan of Abu Daud as a witness marked Ext.1/1.

7. Md. Mobin (P.W. 4) is also a co-villager of the informant and is a F.I.R. witness. He deposed that on 5.1.1984, at about 6.30 P.M., he was basking by the Ghura along with the informant Md.Daud (P.W.6) and the deceased, and a lantern was also hanging by the Oriyani. He stated that in the aforesaid light emanating from Ghura as well as the lantern, he saw 10-11 persons coming near them. He identified 7 of the accused persons who were all co-villagers as named in the fardbeyan. He fully supported the prosecution case narrated by the informant in his fardbeyan. He stated that co-accused, Md.Chamru, warned that no body should move and thereafter accused Md.Sanjat fired which did not hit any body. He further stated that he along with the informant and his brother fled for their lives but they were chased by all the accused persons who were fully armed with fire arms. He stated that ultimately deceased Nadir Sah @ Jumma was surrounded by the accused persons near the southern wall of Shamsul.He further stated that accused Jan Alam, Md.Chamru, and

Noor Alam fired at Jumma who succumbed to the injuries. He stated that he saw the occurrence from Bansbhita (a small cluster of 5 to 6 Bans trees) which was 5 yards away from the place of occurrence. He stated that deceased Jumma on account of injuries had fallen dead on Aam Rasta very close to the southern wall of Shamsul having injuries on cheek, right chin and chest.

8. P.W.5 is Dr. Madan Prasad Gupta who conducted autopsy on the dead body of the deceased on 6.1.1984, at 8 A.M., and prepared post mortem report which has been marked Ext.2. He stated that the occurrence took place within 24 hours and the deceased sustained two injuries.

9. P.W.6 is the informant Abu Daud who in his deposition corroborated the prosecution case. He stated that on 5.1.1984, at about 6.30 P.M., he along with his deceased brother Nadir Sah @ Jumma and Md. Mobin (P.W.4) were basking by the Ghura at the latter's Darwaza which was burning brightly. He stated that he had a torch and a lantern was also hanging in the Oriyani emitting sufficient light. He stated that he had gone to Mobin's place to collect his irrigational dues, and in the aforesaid light he saw 10-11 persons all armed with fire arms coming near them. He identified 7 out of 11 persons as named in the fardbeyan who were all co-villagers. He stated that co-accused Md.Chamru warned that no body should move, whereafter accused Md.Sanjat fired which did not hit any one. He further stated that all of them fled to save their lives but the accused persons who seemed in relentless mood and chased them. He stated that he hid himself by the side of Simal tree whereas the accused persons chased his brother Nadir Sah @ Jumma who was running towards Samshul's house. However, the accused persons surrounded him near the southern wall of Samshul. The deceased Nadir Sah @ Jumma cried for help but nonetheless the accused Jan Alam, Noor Alam and Md.Chamru one after the other fired at his brother as a result of which he fell down and succumbed to the injuries. The accused persons having accomplished their common motive, fled away towards the village. He stated that the deceased sustained three injuries on his cheek, right chin and chest. He also found blood having fallen at the place of occurrence. He stated that quite a few

litigations are going on with the accused persons from before. He further stated that even after the occurrence, the accused persons attempted on his life for which he lodged a case under sections 307 of the Penal Code as well as section 27 of the Arms Act on 17.4.1988. He stated that on account of the occurrence, his leg got damaged and injured. He further deposed that Saidpur Basti is only 200 yards away from the place of occurrence. He stated that Simal trees from where he was witnessing the occurrence was 15-16 hands from the place of occurrence and Azim's house was 5 hands away from the Simal tree.

10. L.P.Singh (P.W.7), and Md.Hasan (P.W.8), are formal witnesses. P.W.7 submitted charge sheet, whereas P.W.8 is a witness to the inquest report as well as seizure of lantern. His signature on carbon copy of Inquest Report and on seizure list pertaining to lantern are marked as Ext.1/4 and Ext.1/6.

11. Bishram Das (P.W.9) is the Investigating Officer of the case. He stated that he was Officer-In-charge of Matihani P.S. on 5.1.1984. At about 7.45 P.M., some people informed at the P.S. that one person has been killed in village Saidpur. After making station diary entry no.65, dated 5.1.1984 (Ext.3), to this effect, he proceeded to the place of occurrence which was 6 K.M.s away, along with Sub Inspector J.N.Singh and other police constables on foot. On reaching the place of occurrence, he recorded the fardbeyan of the informant, Abu Daud (P.W.6), who put his thumb impression as being his true version and the same was also signed by Sub Inspector J.N. Singh, which was marked as Ext.1/3 and Ext.4 respectively. He stated that he found the injuries on the person of the deceased and at his dictation the inquest report was prepared by Sub Inspector J.N. Singh which was signed by both of them as well as seizure list witness, Md. Hasan. Thereafter he took subsequent statement of the informant (P.W.6).He stated in his deposition that he found 5-6 bullet marks on the southern wall of Samshul's house where the deceased was attacked. He stated that he went to the place of Mobin (P.W.4) also, where he found the Ghura burning and the lantern still lighted. He found sufficient light emanating from the lantern which on being checked was found to contain sufficient oil. He stated in paragraph 7 of his

deposition that Aam Rasta around which the deceased was shot at was trampled and the near around earth (Mitti) was also wet. He stated in para 8 that Saidpur Basti was 200 yards away from the place of occurrence. He also noticed that the first place of occurrence, i.e. Mobin's house, was 30 yards from the second place of occurrence (Samshul's southern wall where the deceased Jumma was killed). He stated that only a field(Maidan) intervened between Mobin's house and the place of occurrence. He further deposed that Bansbhita from where Md. Mobin (P.W.4) saw the occurrence was only 4-5 yards away from the place of occurrence, and the Simal tree from where the informant (P.W.6) witnessed the occurrence was 15-16 yards from the place of occurrence. He further deposed that document would show that the parties are on litigating terms. The deposition of I.O. corroborated the prosecution case as well as the distance of the various places from P.O. as stated by the informant (P.W.6) and Md. Mobin (P.W.4).

12. Bandan Sahu, A.S.I. (P.W.10) is a formal witness and he has made entry of the instant Matihani P.S. Case No.1/84 in G.R. Register at Sl. No.25/84, marked Ext.10. Vijay Bahadur Singh (P.W.11) is a constable and is a formal witness. He has proved the fardbeyan (Ext.11) which was in the hand-writing of Sub Inspector J.N.Singh.

13. The defence also examined four witnesses. Md. Soyeb (D.W.1) deposed to the effect that Kabir and Suleman are cousins. Md. Hussain (D.W.2) stated that Kabir's daughter was married to the deceased Nadir Sah @ Jumma, and Suleman's daughter is also married in village Saidpur. Md.Gulam (D.W.3) stated that some of the persons who had assembled there were saying that 2-3 persons were carrying a dead body and they threw the dead body and fled away. Md. Qumaruzama(D.W.4) deposed to the effect that there is litigation between the accused persons from before.

14. The specific charges were explained to the accused persons in terms of section 313 Cr. P. C. to which they pleaded not guilty, being innocent and being falsely implicated in this case.

15. On consideration of the materials on record, the learned trial court held that the first place of occurrence which took place by the side of the Ghura near Mobin's

Darwaza does not stand proved beyond reasonable doubt. In support of his finding the learned trial court observed that there was no mark of any gun shot on the western wall near Ghura burning at Mobin's place where co-accused Md.Sanjat is alleged to have fired at P.W.6 (the informant), P.W.4 (Mobin) and the deceased who were warming themselves. The trial court observed that the I.O. has not deposed that he found trampling marks around the maize field where some of the accused were standing. The learned trial court found that there is discrepancy in respect of the time of occurrence as the I.O. stated that he heard firing sound at 7.45 P.M., whereas the informant and other witness stated that firing took place at 6.30 P.M. He further held that the prosecution does not explain as to why the accused persons did not flee inside the Aangan of the house rather they fled towards the mob, which is not a natural conduct. He further held that the witnesses examined are either inimical or interested witnesses and as such their evidence is not reliable. No independent witness has been examined in this case and as such non-examination of some of the witnesses like Azim and J.N. Singh have prejudiced the case of the defence. He further held that there was delay of 2 ½ hours in lodging the F.I.R. He further held that this 2 ½ hours delay in lodging the F.I.R. gave an opportunity to the informant and other PWs to implicate their enemies. The learned trial court further found that there is discrepancy in timing regarding the station diary entry. He stated that it does not inspire confidence as to how the Sub Inspector J.N.Singh was present at 10 PM at the place of occurrence to prepare the inquest report (Ext.6), when in fact he had come to the police station at 9 P.M. with the fardbeyan. The learned trial court doubted the identification of accused persons by prosecution witnesses. The learned trial court also disbelieved the story of accused being identified in torchlight as no torch was shown to the I.O.

16. On the basis of the above findings, the learned trial court held that the charges leveled against the accused persons have not been proved beyond reasonable doubt and as such each of the four accused persons were held not guilty and were consequently acquitted of their respective charges.

17 (a). Mr. Lala Kailash Bihar Prasad, learned Public Prosecutor, indicated the extent and scope of jurisdiction of this court in Government Appeal under section 378 Cr.P.C. in interfering with the judgment of acquittal. He submits that in the facts and circumstances of the case if more than one view is possible, or the view taken by the trial court is unreasonable or not based on proper appreciation of material evidence, it is open to this court to interfere with the judgment of acquittal. Learned Public Prosecutor relied upon a decision of the Apex Court in the case of Shailendra Pratap & another Vs State of U.P., 2003 SCC (Cri) 432. He, however, submitted that on appreciation of evidence that only view is possible which has been taken by the trial court, than the judgment of acquittal must be upheld.

(b) Learned Public Prosecutor further submits that the prosecution has proved beyond all reasonable doubt that there was sufficient source of light for identifying the accused persons who were all co-villagers. He submitted that the standard of visibility of a villager is on a higher scale than the visibility of people living in urban area who are attuned to power light. He relied upon the decisions of the Apex Court in the case of Ram Gulam Chaudhary & Ors Vs State of Bihar, 2001(4) PLJR (SC)123 as well as in the case of Kalika Tiwary Vs State of Bihar, (1997) 4. SCC 445: 1997(2) PLJR (SC) 1.

(c) Learned counsel submits that in the instant case the accused persons on account of previous enmity had animus for committing the alleged offence and prosecution side was victim. Moreover, it is not even the case of the defence that any of the accused persons was even injured. He submits that there has been no delay in lodging the F.I.R., rather the same has been lodged with utmost promptitude. He also stated that medical evidence is in consonance with the prosecution case. He submits that the prosecution has supported the manner of occurrence and the culpability of the accused persons in the crime. He further submits that from the version of prosecution witnesses as well as deposition of the I.O., both the places of occurrence stood proved. He also submits that the prosecution case cannot be discarded on the ground that no independent witness has been examined in this case. There are three eye witnesses to

the occurrence and one corroborative witness who are all named in the F.I.R. He relies upon decisions of the Apex Court in the case of Ramjee Rai & Ors Vs State of Bihar, 2006(4) P.L.J.R. 78 (SC), and the case of Sheelam Ramesh & anr Vs State of A.P.,(1999)8 SCC 369.

(d) Learned counsel further submits that minor discrepancies and contradictions in the prosecution case and some minor latches on the part of the I.O. in conducting the investigation will not impair the credibility of the prosecution case if it is otherwise trustworthy and inspires confidence. He further submits that the I.O. had found trampling marks around the place of occurrence as well as bullet marks on the southern wall of Samshul where the alleged occurrence of murder of Jumma took place. Learned counsel contended that in view of such full proof evidence which had stood the test of cross-examinations, the prosecution case stood fully proved and there was no scope for the learned trial court to have acquitted the accused persons of the charges.

18. Learned counsel for the petitioner in Criminal Revision has adopted the arguments put forth by the learned Public Prosecutor in Government Appeal.

19. Mr.Shakeel Ahmad Khan, learned Senior counsel for the Respondents submits that the learned trial court on consideration of the evidence on record has rightly not found the Opposite Parties guilty of their respective charges. He submits that the evidence of the witnesses is not reliable and there is material infirmity in the prosecution case. He further submits that the prosecution has not proved source of identification and there has been delay in lodging the F.I.R. He also submits that the extent and scope of this court in Government Appeal against the judgment of acquittal is very limited. He submits that if, on appreciation of evidence, two views in respect of it can be formed then the view adopted by the trial court should not be disturbed. He further submits that the trial court conducting the trial has an advantage of seeing the witnesses in the witness box which the appellate court can not have, and as such the latter should not interfere with the judgment of acquittal unless and until the same is perverse or based on no materials or on appreciation of the same, the court in all

circumstances would come to the conclusion otherwise. In support of aforesaid contention learned counsel referred to decisions of Privy Council in the case of Sheo Swarup & Ors Vs King Emperor, 1934 Privy Council 227 and in the case of Jimmy Homi Bharuch Vs State of Maharashtra, A.I.R. 1977 SC 1213; in the case of Mulawa Vs State of M.P., A.I.R. 1976 SC 989; in the case of Bhim Singh Rup Singh Vs State of Maharashtra, A.I.R. 1974 SC 286; in the case of Ramabhupala Reddy & Ors Vs State of A.P., A.I.R. 1971 SC 460 and in the case of Sanwat Singh Vs State of Rajasthan, 1961 SC 715. However, learned counsel laid emphasis in the case of Bhim Singh Rup Singh Vs State of Maharashtra, reported in A.I.R. 1974 SC 286 and in the case of Ramabhupala Reddy & Ors Vs State of A.P. reported in A.I.R. 1971 SC 460.

20 (a) Before this court considers the rival contentions on merits, it would be appropriate to examine the extent and scope of jurisdiction of this court in Government Appeal against the judgment of acquittal. The extent and scope of power of the appellate court is prescribed in section 386 of the Cr.P.C.

(b) The earliest of the leading judgments in matters of appeal at the instance of the State against acquittal was in the judgments of the Privy Council in the case of Sheo Swarup & Ors Vs King Emperor, 1934 Privy Council 227, and in the case of Noor Mohammad Vs Emperor, 1945 Privy Council 151. The Privy Council observed that in such appeals, the High Court has full power to appraise all the evidences upon which order of acquittal was founded. In the first case referred to above, the Privy Council observed that if the judgment of trial court is perverse or based on distorted conclusion, or where the original court has blundered, the appellate court can always convert the judgment of acquittal into conviction.

(c) The matter relating to extent and scope of such an appeal acquittal fell for consideration of a Bench of three Judges of the Apex Court in the case of Sanwat Singh and Others Vs State of Rajasthan, A.I.R. 1961 S.C. 715, wherein their Lordships' have observed that the appellate court has full power to appraise the evidence upon which the order of acquittal is founded.

(d) The Apex Court in the case of Ramabhupala Reddy & Ors Vs State of Andhara Pradesh, A.I.R. 1971 SC 460 reiterated the earlier view of the Apex Court regarding full power of appraisal of the evidence upon which the order of acquittal is founded. It was in agreement with the principles laid down in Sheo Swarup's case, A.I.R. 1934 Privy Council 227, and Sanwat Singh Vs State of Rajasthan, A.I.R. 1961 SC 715. The Apex Court therein laid guidelines for an appellate Court's approach in disposing of such an appeal and observed that the different phraseology used in the judgments such as (a) substantial and compelling reasons, (b) good and sufficiently cogent reasons, (c) strong reasons, are not intended to curtail the undoubted power of an appellate court in an appeal against acquittal to review the entire evidence and come to its own conclusion(s), but in doing so it should not only consider every matter on record having a bearing on the questions of facts and the reasons given by the court below in support of its order of acquittal but should express reasons in its judgment which led it to hold that the acquittal was not justified.

(e) The Apex Court in the case of Bhim Singh Rup Singh Vs State of Maharashtra, A.I.R. 1974 SC 286 while examining the similar issue observed that the Appellate Court has power to review the entire evidence and to come to its own conclusion in an appeal against acquittal. In exercising this power, the appellate court should not only consider every matter on record having a bearing on the questions of fact and the reasons given by the court below in support of its order of acquittal but it must express its reasons in its judgment which led it to hold that the acquittal is not justified. The appellate court must bear in mind the fact that the trial court had the benefit of seeing the witnesses in the witness box and the presumption of innocence is not weakened by the order of acquittal.

f) In the case of Shailendra Pratap & another (Supra), 2003 SCC (Cr)432 the Apex Court while dealing with the extent and scope of an appeal under sections 386 and 378 Cr.P.C. observed that the Appellate Court would not be justified in interfering with the order of acquittal unless the same is found to be perverse. It further observed that if the order of the trial court is reasonable one and does not suffer from vice of

perversity, then in such cases the appellate court should not interfere with the order of acquittal.

21. It would appear from aforesaid pronouncements of the Apex Court and the Privy Council as well as jurisdiction created by section 386 Cr.P.C., that an appellate court has wide powers co-extensive with that of the trial court while dealing with appeal against acquittal. It can review, evaluate and appraise the entire evidence afresh and on so doing if it comes to the conclusion that the view adopted by the trial court is perverse, wholly unreasonable, or unconvincing, it can interfere with the order of acquittal. It can also interfere with the order of acquittal if there is material illegality and manifest error apparent on record or the trial court has blundered causing miscarriage of justice. However, the appellate court before reversing an order of acquittal should endeavor to displace or dispel in a general or specific way the primary reasoning of trial court upon which acquittal was based. The Appellate Court must express its reasons in its judgment which led it to hold that acquittal is not justified. Furthermore, if two reasonable conclusions can be reached on the basis of the evidence on record, the appellate court should not disturb the findings of the trial court as the trial court has the benefit of seeing the witnesses in witness box and is in a position to observe their thought process.

22. In view of the propositions laid down by the Apex Court and the Privy Council and the observations made therein, we now proceed to analyse the evidence and the reasons given by the learned trial court in acquitting the accused persons.

23. The trial court while acquitting the accused persons observed in paragraph 24 of its judgment that there has been inordinate delay of 2 1/2 hours in lodging the F.I.R. It would appear from the fardbeyan (Ext.2) that the occurrence took place on 5.1.1984 at about 6.30 P.M., and the informant gave his fardbeyan at 9 P.M. at the place of occurrence just 2 1/2 hours after the occurrence. The fardbeyan made by the informant (P.W.6) was taken to the concerned Police Station which was 6 K.Ms away, and a formal F.I.R., being Matihani P.S. Case No.1 of 1984, was drawn up in the same night at 11.45 P.M. itself. This fact also finds supports from the evidence of

Md.Mobin (P.W.4) and Ataur Rahman (P.W.3). It would appear from the evidence of the I.O. that he learnt about the firing and alleged killing of a person in village Saidpur at 7.45 P.M. and after making an entry in the station diary he along with other police personnel left on foot for the place of occurrence which was 6 KMs away. It took the I.O. (P.W.9) one hour to reach the place of occurrence. As per deposition of the I.O., he reached the P.O. at 9 P.M. and immediately recorded the fardbeyan of the informant (P.W.6). Not only this, a formal F.I.R. was instituted soon thereafter the same evening at 11.45 P.M. The endorsement of other P.Ws on the fardbeyan would also confirm the aforesaid fact that the fardbeyan was recorded at 9 P.M. It was very natural and not unusual for the prosecution witness to have remained at the place of occurrence protecting the dead body for the first few hours instead of instantly rushing to P.S. which was 6 K.Ms away in view of the admitted hostility of accused persons who were in large numbers and were of the same village. It also appears from the evidence that the prosecution witnesses were not having any vehicle or carrier at that time.

In view of the aforesaid facts the view of the learned trial court that there has been inordinate delay of 2 1/2 hours in lodging the case is most unconvincing and unacceptable. In fact, the fardbeyan was recorded within 2 1/2 hours of the occurrence with great promptitude and there has been no delay in even instituting the formal F.I.R., all within a few hours.

24 (a). The learned trial court has doubted the prosecution case on the point of source of light and identification. It would appear from the evidence on record that the finding of the learned trial court is contrary to the materials on record. As per prosecution case, the occurrence took place at two places. The first place of occurrence is the house of Md. Mobin (P.W.4) where an attempt was made on the life of the informant's brother Nadir Sah @ Jumma, and the second place of occurrence is Aam Rasta near the southern wall of Samshul where the deceased Jumma was ultimately murdered.

(b). The informant has stated that he had gone along with his brother Nadir Sah @ Jumma to Mobin's house which is the first place of occurrence to collect his irrigational dues. He stated that he along with his brother and Md.Mobin were basking by 'Ghura' and a lantern was hanging in the Oriyani which were emitting sufficient light. Apart from this the informant was having torch in his hand also. The informant and Md.Mobin (P.W.4) deposed in the evidence that they saw the accused persons in the light emanating from Ghura, lantern, as well as flash of torch light. It would be very relevant to note that the informant, P.W.4, P.W.3 and P.W.2 claimed to have identified only 7 out of 11 accused persons who were all co-villagers. The remaining accused persons who were not identified were not named which would also point at the truthfulness of the evidence of these witnesses. Thus, there was no attempt to wrap up all of them and the prosecution witnesses have taken care to name only those of the accused persons about whom they were sure. The prosecution witnesses, the informant and P.W.4 stated that in view of the sources of light mentioned above, they saw all the accused persons variously armed with weapons. They further stated that one Md.Chamru instigated whereupon one Md.Sanjam opened fire which, however, did not hit any body. Thereafter the informant, his brother (deceased), and Mobin all fled for their lives and the accused persons chased them. The informant after fleeing some distance hid himself by the side of Simal tree from where he saw his brother Md.Nadir Sah @ Jumma being surrounded by the accused persons near the southern wall of one Samshul's house. The informant's brother Jumma shouted for help. In the meantime, Chamru, Noor Alam (not before us), Md.Jan Alam, Opposite Party No.4 fired instantly from their respective guns and rifles at his brother as a result of which he succumbed to the injuries. Even in respect of second place of occurrence the P.W.s 4 and 6 were at a close range from where they could easily identify the accused persons who were their own co-villagers and who had just some minutes before had made an attempt on the life of one of them at Mobin's place where they were also identified in light emanating from 'Ghura', lantern, and torch light.

(c). With regard to identification, the submissions of learned Public Prosecutor that the standard of visibility of a villager accustomed to poor light is on a higher scale, than the visibility of people living in urban area as the latter become attuned to brighter lights is well established.

(d). It would be useful to quote the relevant extract of the observations made by the Apex Court in the case of Ram Gulam Chaudhary & Ors Vs State of Bihar, 2001(4) PLJR (SC) 123, relying upon case of Kalika Tiwari Vs State of Bihar, (1997) 4 SCC 445: 1997(2) PLJR (SC) 1, wherein the Hon'ble Apex Court held as follows:

“The visible capacity of urban people who are acclimatized to fluorescent lights or incandescent lamps is not the standard to be applied to villagers whose optical potency is attuned to country-made lamps. It has been held that the visibility of villagers is conditioned to such lights and hence it would be quite possible for them to identify men and matters in such light”

25. From the aforesaid facts and circumstances of the case, it would appear that as the accused persons and the P.Ws identifying the accused persons were of the same village and would have been seeing each other for quite a long time also because of the long pending litigations, there could not have been any difficulty in identifying the accused persons. The aforesaid view also finds support from the decisions quoted above.

26. The next issue is whether the accused committed murder and the occurrence as alleged took place. In the F.I.R. the informant (P.W.6) stated that while he along with his brother Jumma and Mobin (P.W.4) were basking by Ghura at Mobin's place, the accused persons including the Opposite parties variously armed with weapons came there and one of the accused Md.Chamru warned them not to move from their position where upon another co-accused opened fire which did not hit any body. The informant, his brother and Md.Mobin ran for their lives immediately thereafter. The informant and Md.Mobin (P.W. 4) specifically stated that they identified the accused persons being variously armed with lethal weapons in the light emanated by Ghura, lantern, as well as torch. Both P.W.4 and the informant (P.W.6) as well as P.W.3 stated that the accused persons chased the informant and his brother till the latter was

finally surrounded near the southern wall of Shamshul. Thereafter three accused persons including Jan Alam (Opposite party no.4) opened fire killing Nadir Sah @ Jumma then and there. Thereafter they stated that the accused persons fled towards the village. Md.Adil (PW.2) also stated that they saw the accused persons variously armed with weapons fleeing towards the village after the occurrence. These witnesses have remained unshaken in their cross-examination and their statements in this regard are consistent. Thus the occurrence as alleged in the prosecution case stands fully proved beyond all doubts and the contrary finding in this respect by trial court is a totally wrong and distorted appreciation of material facts.

27. The medical evidence also supports the prosecution case in as much so two fatal wounds have been found on the deceased; one around the cheek and the other near the right nipple towards the right side of the chest. Such fire shot injuries caused from a close range are sufficient in ordinary course of nature to cause death. All these circumstances show that the accused persons had a pre-concerted plan to kill the deceased. The aforesaid intention of theirs is evident from the fact that when first attempt failed, the accused persons chased the deceased Jumma and ultimately cornered and murdered him. All these would go to show that the accused persons had common intention as well common object to liquidate the informant's brother Nadir Sah @ Jumma. Therefore, the prosecution unmistakably has proved the murder of Jumma as alleged in the prosecution case recorded in the F.I.R.. We, therefore, hold that the trial court grievously erred in acquitting and not convicting the accused persons for murder.

28. The next question is who were responsible for the murder of the deceased Nadir Sah @ Jumma. As would appear from the foregoing discussions that all the accused persons including the Opposite parties having tracked the deceased right from the place of Md. Mobin with a pre-concerted intention to commit his murder and even as latter tried to flee, the accused persons including the Opposite parties chased and three persons including Opposite party no.4 opened fire one after the other killing him on the spot.

29. From the evidence of the witnesses, it would appear that all the Opposite parties shared common intention of killing Jumma and as Opposite party no.4 along with two others absconding accused inflicted fatal wounds, we find Md.Jan Alam guilty of having committed murder.

30. So far as other accused persons namely Opposite Parties 1 to 3 are concerned, it would appear that they came variously armed with weapons at Mobin's place and an attempt was made by one of them on the life of the deceased which failed. Thereafter when the deceased and others tried to flee, all the accused persons chased them vigorously and finally the deceased was surrounded in a planned manner whereupon three accused persons opened fire resulting into his death. Thus it stands established that the other accused persons also shared common intention of killing the deceased as they throughout participated in the incident which started at the place of Mobin and culminated at the southern wall of Samshul's house. Thus, we find that Opposite parties 1 to 3 also shared common intention with other accused persons for committing murder of deceased Jumma. As the aforesaid accused persons moved menacingly with deadly weapons for committing an offence of murder, we find them guilty of rioting also.

31. The other issue is whether conviction can be based on the evidence of interested witnesses and inimical witnesses and whether the evidence of prosecution witnesses can be held reliable. The trial court held that non-examination of independent witness has weakened the prosecution case as witnesses examined are all interested one. It has also held that the evidence of witnesses are unreliable. It would appear from the evidence of the prosecution witnesses that P.Ws 2 and 3 are related to each other. It is defence case that earlier both P.W2 and P.W.3 have deposed against some of the accused persons and as such they are not independent witnesses. The informant (P.W.6) has himself stated that litigations are going on between the parties from before. P.W.4 Md. Mobin who is a F.I.R. witness is not directly related to either informant or P.Ws 2 and 3. The defence at the most have tried to impress that son of this witness and deceased Jumma were married in same village to daughters of

Suleman and Kabir. It has been submitted that both Suleman and Kabir are cousins. Furthermore it would be found from Para 29 of the impugned judgment that at the instance of defence itself, summons was issued to Chowkidar Mangal Tanti for testifying before the court. But it was the defence which did not press for his examination. As such it does not lie in the mouth of the defence to claim prejudice for withholding to examine some of the witnesses. The non-examination of J.N.Singh also does not prejudice the prosecution case on account of minor error in recording the time in Station Diary of bringing fardbeyan to Police Station which can be on account of minor error in estimating the time.

32. It is well settled law that the testimony of witnesses cannot be discarded solely on the ground that they are interested or otherwise having animus. The test for holding the reliability or otherwise of such witnesses ought to be based on the quality of their evidence. This court finds that the witnesses have stated truthfully and have not been shaken in cross-examination, and there is no material contradiction in their evidence going to the root of the prosecution case and as such in these circumstances the evidence of the witnesses cannot be discarded on the ground of being interested witness.

33. The views expressed above find support from a decision of the Apex Court in the case of Ramjee Rai & Ors, 2006(4) P.L.J.R.(SC) 78, wherein their Lordships in paragraph 26 of the judgment held as follows:

“It is now well settled that what is necessary for proving the prosecution case is not the quantity but quality of the evidence. The court cannot overlook the changes in the value system in the society. When an offence is committed in a village owing to land dispute, the independent witnesses may not come forward”.

The Apex Court again in the case of Sheelam Ramesh and anr. Vs State of U.P., (1999)8 SCC 369 observed as under:

“Courts are concerned with quality and not with quantity of evidence and in a criminal trial, conviction can be based on the sole evidence of a witness if it inspires confidence”.

The Apex Court in the case of Ramabhupala Reddy & Ors Vs State of Andhara Pradesh, A.I.R. 1971 SC 460, has observed that non-examination of independent witness will not erode the credibility of prosecution witness if it is otherwise trustworthy.

34. We find from the materials on record that the evidence of three eye witnesses of the occurrence, namely, the informant P.W.6, Md.Mobin (P.W.4), and Ataur Rahman (P.W.3) are consistent having no major variance or contradiction going to the root of the prosecution case. Even P.W.2 who is a corroborative witness, has stated that he saw the accused persons while fleeing away from the place of occurrence.

In view of the aforesaid materials on record, we hold that the trial court once again grievously erred in holding the evidence of these witnesses to be unreliable.

35. The next issue is whether the medical evidence is in consonance with the prosecution case or not. The inquest report and the post mortem report of the deceased Jumma have been made exhibits in this case. The prosecution has also examined Dr. Madan Prasad Gupta who conducted post-mortem on the dead body of the deceased. It would appear from the inquest report which was prepared on the same night that the deceased had wounds on cheek, right chin, and right chest surrounded with black marks and blood having trickled from the injuries. The Doctor who conducted the post-mortem found two fatal injuries on the person of the deceased. The first injury was a deep and irregular burnt margin 2"x2"x2" over the right cheek with surrounding areas with black stain with communicative fracture on the right side of the mandible and maxilla and there was laceration of the surrounding tissues and the tongue. Multiple pellets and cork were also found embedded.

The second injury was a penetrating wound 1/2" diameter with burnt and inverted margin over the 4th costal cartilage. On dissection the right lung was found penetrated. There was blood in the right side of chest cavity. There was also blood in the left side of chest cavity. There was also penetration of lower lobe of the left lung. There was hole in the heart. There was fracture of the ninth rib. There was wound on the back size 1" in diameter with inverted margin. Pellets and cork were also found

embedded. The Doctor opined that the aforesaid injuries were fire-arm injuries sufficient to cause death.

36 (a). It would appear from the evidence of the prosecution witnesses, namely, the informant (P.W.6) and Md. Mobin (P.W.4) that three accused persons including Opposite party no.4 one after another shot at the deceased after surrounding him near the southern wall of Samshul. The I.O. in course of investigation also found 5-6 fire arm marks on the southern wall of Samshul which also shows that some of the fire opened by the accused persons missed the target and hit the southern wall of Samshul being just at back of the place where the deceased was surrounded.

(b). The learned trial court was of the view that since the deceased sustained only two fire arm injuries whereas three persons opened fire at him, the prosecution case does not stand corroborated. In our opinion, such view of the trial court cannot be accepted. There is no presumption in law that if a group of persons opened fire, it will cause as many injuries on the deceased. Some of the shots can miss the target. The Hon'ble Apex Court in the case of Mithilesh Upadhyaya Vs State of Bihar, 1997 S.C.C.(Cri) 716, was considering the testimony of eye witnesses wherein it was alleged that each of the three appellants fired at the victim and that each of shots hit him. In the post mortem report only two wounds of entry were found on the person of the deceased. On this basis the defence argued that the case of the prosecution does not find corroboration from the post mortem report. The Apex Court dispelling the argument of the accused persons observed that the testimony of the eye witnesses cannot be discarded merely because only two wounds of entry was found in the post-mortem examination as against allegation of three definite shots hitting the deceased. The Apex Court observed that as the occurrence was witnessed by the eye witnesses from some distance, it is very probable that they could overlook that on account of misfiring or erratic aim, some of the fire opened by accused may miss the target.

(c). This is not a case where the injuries found on the person of the deceased have been found to be caused by any other weapon other than the fire-arm.

(d). In view of the above fact, we hold that the trial court seriously erred in holding that merely because two wounds were found in the post-mortem of the deceased, the prosecution evidence becomes doubtful and cannot be sustained.

37 (a). The trial court held that there are discrepancies in investigation of the I.O. and as such serious prejudice has been caused to the defence. It has been observed by the trial court that there appears some contradiction regarding the time in respect of recording of fardbeyan and the same being received at the Police Station vis-i-vis the preparation of inquest report as well as death/body challan. The learned trial court observed that it has come in the evidence of few witnesses that some of the accused persons also passed through maize field but the I.O. did not care to make any investigation in this regard. The I.O. has not made any entry in the case diary whether he found the maize field trampled or not. On this ground also, the trial court found the evidence of prosecution unreliable.

(b). In this respect, we find that the learned trial court while coming to the aforesaid conclusion over-looked many material aspects of prosecution case. From the evidence on record, it would appear that the I.O. found sufficient means of identification at Mobin's place, the first place of occurrence. He also found blood at the second place of occurrence, as alleged by the prosecution side. The I.O. also found gun-shot marks on the southern wall where the deceased was fired upon by the miscreants. The I.O. also found foot marks in around the place of occurrence. He also found wet earth near the place of occurrence on account of blood having drooped from the wound.

(C). In this back-ground, the minor omission on the part of the I.O. do not cut at the root of the prosecution case. It is well settled by a catena of decisions that slackness or in action on the part of the I.O. in collecting all materials will not affect credibility of otherwise consistent depositions of eye witnesses which has remained by far and large consistent and unshaken.

38. Further more some minor discrepancy regarding time of receipt of fardbeyan in P.S. brought by Sub Inspector J.N.Singh vis-i-vis the time of recording of inquest report and the body challan has been highlighted by the trial court. The minor

discrepancy regarding the entry of time at which Sub-Inspector J.N.Singh reached the Police Station with fardebyan would also not hit at the prosecution case as that would be a minor error in recording or estimating the time in the night.

39. In view of the aforesaid findings, we hold that there is no material discrepancy in investigation though there is some minor latches on part of I.O. (P.W.7). Such latches did not cause any prejudice to the defence and does not go to the root of the prosecution case. We hold that the finding of the learned trial court in this respect also is erroneous, unreasonable and bears no nexus with the materials on record.

40. The deposition of the defence witnesses do not in any way weaken the prosecution case. None of them have stated that they saw the murder being committed in any other manner, or the accused persons were not present, or that prosecution side was aggressor. Thus, the defence witnesses do not discredit prosecution evidence in any manner.

41. We are convinced that no person duly instructed in law can reach the conclusion as has been done by the learned trial court on the basis of the materials on record. We entirely disagree with the findings recorded by the learned trial court. We are equally convinced that the materials on record do not give any room for two views, and the view that we have taken is the only possible view on the basis of the materials on record. We accordingly set aside the judgment of the learned trial court.

42. We accordingly hold that the prosecution has established the guilt of the accused beyond all reasonable doubts. In view of the foregoing discussion and also in view of the fact that Opposite party no.4 opened fire at the deceased killing him on the spot, we hold him guilty under section 302 of the Indian Penal Code. The remaining accused persons in view of the finding that pursuant to their common intention, they participated in the occurrence in a pre-concerted manner variously armed, we hold them guilty under sections 302/34 and 148 of the Penal Code, and consequently all of them are sentenced to under go life imprisonment. However, no separate sentence is being passed in respect of section 148 of the Penal Code. In the circumstances, the

accused persons should surrender immediately for being taken in judicial custody for serving the remaining part of their sentence.

43. In the result, the Government Appeal is allowed and the impugned judgment and order is set aside. As the main order has been passed in Government Appeal, no separate order is required to be passed in Cr .Revision and the same stands accordingly disposed of.

44. We are conscious of the fact that an order of acquittal is being reversed into one of conviction after 20 years. But in view of the fact that the evidence on record unmistakably lead to the one and only conclusion pointing towards the guilt of accused persons, the writ of justice enjoins upon us to pass the order accordingly.

56. We must place on record our deep appreciation of the valuable assistance rendered by Mr.Lala Kailash Bihari Prasad, the learned Public Prosecutor.

(Samarendra Pratap Singh,J)

(Sudhir Kumar Katriar,J)

Patna High Court
27th June, 2008
KHAN/A.F.R.

